Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

APPELLEES' OBJECTION TO BRIEF OF PEABODY TESTING – BILL MILLER X-RAY, INC., *AMICUS CURIAE* (FOR APPELLANTS)

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STATEMENT OF OBJECTION

The *Brief of Peabody Testing–Bill Miller X-Ray, Inc., Amicus Curiae (for Appellants)* was received in the Office of the Attorney General for the State of Alaska on January 6, 1978. The undersigned counsel for appellees was out of state at the time the *Brief, etc.* was received and did not learn of it or have an opportunity to review it until January 9, 1978.

Although the undersigned had originally granted his consent to counsel for Peabody Testing-Bill Miller X-Ray, Inc. (hereinafter "Peabody-Miller") to file a brief *amicus curiae* in this case, that consent was conditioned on Peabody-Miller's limiting the scope of its brief to those issues properly raisable from the decision of the Alaska Supreme Court. 565 P.2d 159 (1977).[1] It is apparent from even a cursory review of Peabody-Miller's brief, however, that the issues raised by it go far beyond that limitation. Therefore, we feel compelled to object, pursuant to Rule 42.3 of the Rules of the Supreme Court of the United States, to Peabody-Miller's brief *amicus curiae.*

The brief of Peabody-Miller raises issues neither raised nor pressed by the appellants in the Court below. These issues include asserted violations of the Supremacy Clause of the United States Constitution, asserted interference with the free flow of labor in inter-state commerce, in violation of the Commerce Clause, and asserted arbitrary and discriminatory regulation based on "extremely heavy penalties" for failure to comply with the Alaska Hire law, AS 38.40, in violation of the equal protection clause of the 14th Amendment to the United States Constitution. The Alaska Supreme Court had not been presented with those issues when it decided the case; nor was it presented with a factual record which would have permitted it to do so.[2]

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[1]The contents of our letter to counsel for Peabody-Miller which accompanied our consent form are set out in the Appendix to this Objection.

[2]For instance, had the issue of Alaska Hire's interfering with federal labor law under the Supremacy Clause been raised at the trial court level, the State would have demonstrated that no such interference in fact arose; that both unions and management freely agreed to carry out their hiring procedures in accordance with Alaska Hire; that the General Counsel to the National Labor

[footnote continued]

This Court has made it clear that it will not undertake to review that which a Court below did not decide. *Walters v. St. Louis,* 347 U.S. 231, 233, 98 L.Ed. 600, 74 S.Ct. 505 (1954). The brief of Peabody-Miller proposes that the Court do precisely that, however, and it is for this reason that we now object to that brief *amicus curiae* and respectfully request that it be excluded and disregarded by the Court. Peabody-Miller must wait until after the State of Alaska determines, if it does, that Peabody-Miller violated the provisions of Alaska Hire. At that point it may, assuming it considers its constitutional objections to be of merit, raise its claims in defense to such a determination by appealing that decision in accordance with established procedures for appeals of final decisions of administrative agencies in Alaska.

DATED: _____

Respectfully submitted,

By: RONALD W. LORENSEN
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL

Relations Board issued an opinion stating that unions may, consistent with the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, establish dispatch precedures which were in accord with Alaska Hire; that union contracts covering work subject to Alaska Hire did not provide for a lay off procedure which was inconsistent with Alaska Hire; and that, with respect to Peabody-Miller, the union representing its X-ray technicians *sought* to dispatch Alaska residents to Peabody-Miller, but that the employer refused to accept them.

APPENDIX

December 28, 1977

Mr. Richard L. Marcus
Adams, Fox, Marcus & Adelstein
208 S. LaSalle Street
Suite 1278
Chicago, Illinois 60604

Dear Mr. Marcus:

This is in response to your letter dated December 16, 1977, requesting written confirmation of my consent to your filing a brief amicus curiae on behalf of Peabody Testing – Bill Miller X-Ray in the case of *Hicklin v. Orbeck*, No. 77-324, now pending in the Supreme Court of the United States.

As attorney for the appellee in that case, I hereby give such consent, so long as your brief addresses only issues and matters properly raisable from the Alaska Supreme Court decision in the case.

Sincerely yours,

OFFICE OF THE
ATTORNEY GENERAL

By:
Ronald W. Lorensen
Assistant Attorney General

RWL:jf